IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

R. PETERS MILLER, Plaintiff, v. JANNEY MONTGOMERY SCOTT INC. and THE EXECUTORS OF THE ESTATE OF GEORGE deB. BELL: ROBERTA M. BELL, JAMES T. BE.., SOPHIE B. AYRES, GEORGE deB. BELL, JR., Defendants.	Civil Action No.96-8709

Gawthrop, J. June , 1998

M E M O R A N D U M

Before the court is a motion by defendants for summary judgment on plaintiff's claims of misrepresentation and breach of contract by deliberate concealment of a court order. Plaintiff alleges that defendants deliberately misrepresented the required minimum investment in a partnership and directed another company not to give stock to plaintiff, in violation of a bankruptcy court order. For the reasons set forth below, I shall grant defendants' motion.

Plaintiff Miller used to work for defendant Janney Montgomery Scott (Janney). George deB. Bell was a vice president, and later a vice chairman of the board, for Janney. In 1983, Janney was the placement agent for a limited partnership, Array Processor Research & Development. Plaintiff claims this partnership was formed by Helionetics, a California

corporation. Documents submitted by defendants state that Array was a limited partnership which was formed to contract with a subsidiary of Helionetics, Marinco Computer Products, Inc. The general partner in Array was Microcircuit Development Corp., a company not previously associated with any of the others. The initial minimum investment for a limited partnership interest in Array was $250,000, but was later decreased to $100,000. Plaintiff alleges he did not know of the change in the minimum investment, and if he had known he would have invested only $100,000 rather than $250,000. Plaintiff alleges that around 1990 Array went into bankruptcy, and that a bankruptcy court ordered Helionetics to issue shares of Helionetics stock to Array investors, including plaintiff. He never received any shares of Helionetics stock.

Statute of Limitations

Defendants argue that both of plaintiff's claims are barred by the statute of limitations. Plaintiff argues that the statute of limitations had not expired on either claim by the time he filed his complaint on December 31, 1996. He contends that the defendants have not proved that he knew of the alleged misrepresentation on a specific date and that he has not been able to gather evidence of the bankruptcy order.

Under Pennsylvania law, once the defense of statute of limitations has been raised, the plaintiff bears the burden of

proving he filed his claims within the applicable statute of limitations. In re TMI, 89 F.3d 1106, 1116 (3d Cir. 1996). “As a matter of general rule, a party asserting a cause of action is under a duty to use all reasonable diligence to be properly informed of the facts and circumstances upon which a potential right of recovery is based and to institute suit within the prescribed statutory period.” Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc., 468 A.2d 468, 471 (Pa. 1983). However, Pennsylvania courts do invoke the "discovery rule," which "tolls the statue of limitations until plaintiff could have reasonably discovered [his] injury and its cause." Speicher v. Dalkon Shield Claimants Trust, 943 F. Supp. 554, 557 (E.D. Pa. 1996). A plaintiff invoking this rule has the burden of proving that he is entitled to its benefit by showing that he "exercised diligence to ascertain the existence or cause of [his] injury but could not discover those facts in spite of [his] diligence." Speicher, 943 F. Supp. at 557.

As a corollary to the discovery rule, the doctrine of fraudulent concealment also tolls the statute of limitations. Pennsylvania courts apply this doctrine where the defendant, through fraud and concealment, has caused the plaintiff to relax his vigilance. Bohus v. Beloff, 950 F.2d 919, 925 (3d Cir. 1991). In order to establish fraudulent concealment by the defendants, the plaintiff must prove “an affirmative or

independent act of concealment that would divert or mislead the plaintiff from discovering the injury" or its cause. Id. The plaintiff has the burden of proving fraudulent concealment by "clear, precise and convincing evidence." Bohus, 950 F.2d at 925 (quoting Molineux v. Reed, 532 A.2d 792 (Pa. 1987)).

Plaintiff's claim of misrepresentation in the placement offering is governed by Pennsylvania's two-year statute of limitations, as set forth in 42 Pa. C.S.A. § 5524. Defendants provided documentation of the placement offering which forms the basis of plaintiff's misrepresentation claim. These documents demonstrate that Miller knew or should have known that the required minimum was $100,000 in October 1984; if a misrepresentation was made, it therefore was made at that time. Levinson v. Souser, 557 A.2d 1081 (Pa. Super. 1989) (holding that a tort case of action accrues when the injury occurs); Continental Life Ins. Co. v. Shearson Lehman Hutton, Civ. A. No. 88-9279, 1992 WL 6750, *2 (E.D. Pa. Jan. 14, 1992) (citing Volk v. D.A. Davidson & Co., 816 F.2d 1406, 1412 (9th Cir. 1987)) ("[T]he cognizable injury occurs at the time an investor enters . . . a transaction as a result of material misrepresentations.").

Plaintiff has presented no evidence of later discovery, of diligence in ascertaining the cause, or of an act of concealment by the defendants. Because his alleged injury occurred in March

1984,[1] the statute of limitations began to run in March 1984 and expired in March 1986. The lack of facts in the record showing otherwise validates the statute-of-limitations defense. See In Re TMI, 89 F.3d at 1117 ("Beyond mere assertions, plaintiffs have not directed us to any evidence in the record that raises a material fact as to whether any plaintiff filed suit within two years of discovery of an "initial injury." Accordingly, we believe summary judgment is appropriate.").

Similarly, Miller's claim against Janney for breach of contract in connection with the unidentified bankruptcy proceeding is barred by the applicable statute of limitations. Plaintiff claims that Janney breached an implied or express contract and a bankruptcy court order by asking Helionetics not to issue stock to him. Defendants have steadfastly denied the existence of a contract or any knowledge of an order to notify plaintiff of shares to which he was entitled.

Under Pennsylvania law the statute of limitations for breach of contract is four years. 42 Pa. C.S.A. § 5525 (Supp. 1997). Plaintiff here has failed to meet his burden of proving that he filed his claim within the applicable statute of limitations. See In re TMI, 89 F.3d at 1116. Plaintiff has not given any dates relating to this claim, other than his claim that Array

[1]I assume the time of the alleged injury to be the date of Miller's last payment to Array Processor, March 12, 1984.

went into bankruptcy "around 1990." (Compl. ¶ 14.) He offers no documentation of when he learned of the breach of the contract, of his diligence in investigating the breach, of when the court ordered Helionetics to issue shares, or of when he learned of the alleged bankruptcy order. Indeed, he offers no evidence that Array ever did go into bankruptcy. The only bankruptcy in evidence is that of Helionetics, commenced in 1986. Even assuming that the plaintiff's contract claim relates to the Helionetics bankruptcy in 1986, his claims are properly barred by the four year statute of limitations. In sum, he has not pointed to any evidence that he brought his breach of contract claim within either four years from the breach, or four years from his discovery of the breach through due diligence. See In Re TMI, 89 F.3d at 1117.

Accordingly, I find that Miller's claims are barred by the applicable statutes of limitations.

Summary Judgment

Even were I to find that Miller's claims were not barred, he has failed to raise a genuine issue of material fact sufficient to withstand defendants' motion for summary judgment. A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrated the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its burden, "the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The moving party shall be granted summary judgment if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," demonstrate the lack of a genuine issue of material fact. "The evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in [the non-movant's] favor." Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986). In other words, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

Misrepresentation

Plaintiff claims that defendants misrepresented to him the minimum required investment in Array Processor, and thereby fraudulently induced him to invest $250,000 instead of the

minimum required amount of $100,000. To prevail on this claim at trial, plaintiff must prove "a misrepresentation fraudulently uttered with the intent to induce the action undertaken in reliance upon it, to the damage of its victim." Moser v. DeSetta, 589 A.2d 679, 682 (Pa. 1991). In support of its motion for summary judgment on this claim, defendants have come forward with affidavits and business records showing that plaintiff was mailed the business plan, which clearly states that $100,000 was the minimum investment. Defendants also have produced copies of plaintiff's investment checks, in amounts which correspond with the amounts required under the $100,000 minimum investment plan. The evidence brought forward by defendants tends to show that defendants notified plaintiff of the change in investment minimum, and thus there was no possible misrepresentation. Plaintiff has not come forward with any evidence to rebut defendants' evidence of notice. He relies solely on arguments of counsel that he never received notice and that there are other potential reasons for the investment payments he made. These arguments are not evidence under Fed. R. Civ. P. 56. Plaintiff has introduced only "metaphysical doubt" about the issue of notice, and no actual evidence. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Accordingly, summary judgment must be granted for defendants on the claim of misrepresentation.

Breach of Contract

On the contract claim, plaintiff alleges that he was entitled to 10,000 shares of Helionetics common stock as part of bankruptcy proceedings for Array Processor. He claims that Janney and Bell persuaded Helionetics not to issue shares owed to him, in violation of a bankruptcy court order. (Compl. ¶ 18 & 19.) However, plaintiff has produced no evidence that, 1) Array Processor entered bankruptcy proceedings, 2) he was entitled to 10,000 shares of Helionetics, or 3) Helionetics was in any way obligated to issue 10,000 shares to him.[2] Section 107 of the Bankruptcy Code provides for public access to all papers filed in bankruptcy cases. Yet plaintiff has produced no evidence of the alleged bankruptcy court order, or of a failed attempt to obtain a copy of such an order.[3]

Plaintiff also alleges that the failure of Helionetics to

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[2]It should be noted that Helionetics is not named as a defendant in the case at bar. Therefore, this court has no jurisdiction over any allegations made against Helionetics for failure to issue shares or to perform any other act, whether mandated by contract or court order.

[3]Fed. R. Civ. P. 56(f) directs the court to delay or deny a grant of summary judgment if the non-movant submits affidavits giving reason why the non-movant cannot bring other affidavits essential to support their opposition. Plaintiff here did not submit any affidavits of reasons why he did not have evidence to support his claim. For example, as to the claim for breach of contract based on a purported bankruptcy, plaintiff has not submitted an affidavit that he was denied access to any bankruptcy papers for reasons of confidentiality or potential defamation – the exceptions to the public access provision of § 107.

issue his shares was based on a "request" by Bell and Janney, "in breach of the obligation of Janney under its express or implied contract with the plaintiff." (Compl. ¶ 20.) Defendants have denied requesting Helionetics to withhold shares from plaintiff, and plaintiff has produced no evidence to the contrary. Plaintiff has also failed to produce any evidence as to the breach of a contract between himself and Janney. In fact, plaintiff has failed to produce any evidence as to the sheer existence of a contract, either express or implied, between himself and Janney. Defendants have denied all these allegations and plaintiff has produced no evidence showing that defendants' denials are anything but true.

Plaintiff further alleges that Bell, Janney, and Helionetics conspired to conceal from him the bankruptcy of Array, the resulting proceedings, and the bankruptcy court order. (Compl. ¶ 21.) Bell and Janney have denied attempting to conceal any bankruptcy, or even knowledge of any bankruptcy, before discovery in this action began. Once again, plaintiff has failed to produce any evidence refuting these denials.

As to the issue of notice, plaintiff alleges that he was given no notice of a bankruptcy nor an "opportunity to intervene and to file a proof of claim." (Compl. ¶ 15.) Bankruptcy Rule 2002 states that notices are to be distributed by "the [bankruptcy court] clerk, or some other person as the court may

direct." In this case, plaintiff has failed to produce evidence that any court designated any of the defendants as an official provider of notice. Plaintiff has not shown that defendants had any duty, created either by contract or by court order, to give him notice of any bankruptcy. Accordingly, summary judgment shall be granted for defendants on plaintiff's breach-of-contract claim.

An order follows.

Claims against estate

Under Penn law a claim against an estate is unenforceable "unless the claim of such claimant is known to the personal representative within one year after the first complete advertisement of the grant of letters to such personal representative or thereafter but prior to distribution." 20 Pa. S.C.A. § 3532 (a) (1997 Supp.). See also DiFlorido v. DiFlorido, 331 A.2d 174, 177 n.4 (Pa. 1975) ("Under section 3532 a claimant had one year from completion of the advertisement of the grant of letters to give notice of the claim."). Letters were advertised by Bell's executors in July and August of 1992. Plaintiff thus had until August 1993 to give notice of his claim against the estate. He does not claim that he did give notice during that time; he alleges only that he gave notice to the estate in December 1994.[4]

Plaintiff says made claim in 1994. Def says assets distrib in 1995- no ev to support this. Compl. made in 1997.

[4]I do not address here whether he did actually give the estate of Bell adequate notice of his claims at that time, I only note that this is the only time he has alleged notice.